INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

AMERICAN TRAILER RENTALS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 9, 1963, that affirmed the order of the district court denying the Commission's motion to dismiss this proceeding under Chapter XI of the Bankruptcy Act.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–13a) is not yet reported. The oral ruling of the district court (App. B, *infra*, pp. 14a–17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1963 (App. C, *infra*, pp. 18a–19a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a corporate rehabilitation under the Bankruptcy Act affecting the rights of widespread public investor-creditors, including a scaling down of their claims for the benefit of stockholders, may be conducted under Chapter XI of the Bankruptcy Act or whether transfer to Chapter X is required.

STATUTE INVOLVED

Chapters X and XI of the Bankruptcy Act (11 U.S.C. 501, *et seq.*, and 701, *et seq.*) are involved in this proceeding substantially in their entirety. The following sections are particularly pertinent:

Section 216(1) (11 U.S.C. 616(1)):

A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

* * * * *

Section 306(1) (11 U.S.C. 706(1)):

For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

* * * * *

Section 328 of the Bankruptcy Act (11 U.S.C. 728) provides:

> The judge may, upon application of the Securities and Exchange Commission or any party in interest, and upon such notice to the debtor, to the Securities and Exchange Commission, and to such other persons as the judge may direct, if he finds that the proceedings should have been brought under chapter 10 of this title, enter an order dismissing the proceedings under this chapter, unless, within such time as the judge shall fix, the petition be amended to comply with the requirement of chapter 10 of this title for the filing of a debtor's petition or a creditors' petition under such chapter, be filed. Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 532 of this title, such amended petition or creditors' petition shall thereafter, for all purposes of chapter 10 of this title, be deemed to have been originally filed under such chapter.

STATEMENT

The issue in this case is whether these proceedings for the financial rehabilitation of the respondent corporation may be conducted as an arrangement under Chapter XI of the Bankruptcy Act rather than as a corporate reorganization under Chapter X of that Act. It arises from the denial of an application of the Securities and Exchange Commission pursuant to Section 328 of the Bankruptcy Act (11 U.S.C. 728), which provides that the judge, upon application of the Securities and Exchange Commission or any party in interest, if he finds that proceedings for an

arrangement under Chapter XI "should have been brought under chapter 10," may dismiss the Chapter XI proceedings unless, within the time fixed by him, the debtor or its creditors amends the petition "to comply with the requirement of chapter 10."

1. THE RESPONDENT'S ORGANIZATION AND OPERATIONS

The respondent ("the debtor") was organized in 1958 to engage in the automobile trailer rental business (R. 3, 24). The trailers are of the general utility type which are attached to the rear bumper of an automobile (R. 3, 26). They are kept at gasoline service stations, the operators of which act as rental agents for the debtor (*ibid.*). When the petition for an arrangement was filed, the debtor had about 500 such service station agents (R. 3). The trailer rental system was originally operated by a complex of separate corporations, including the debtor, but in 1961 all the companies were merged into the debtor (R. 36, 102, 140–41, 190).

The individual trailers were sold to public investors under an agreement by which the owner leased the trailer back to the debtor for leasing to the public, and the debtor agreed to pay the owner a fixed rental (R. 3). Most of the trailers were sold under agreements to pay the owners a fixed percentage of the purchase price of the trailer—either 2 percent per month for 10 years (which was the basis upon which a majority of the trailers were sold) or 3 percent per month for 5 years (R. 3, 26). In addition, a comparatively small number of trailers were sold under an agreement by which the owner

received his respective share of 35 percent of the total rental income (less repair costs) produced by the trailers of those selecting this method of payment (R. 26). The debtor sold 5,866 trailers to hundreds of investors throughout the Western States for an aggregate price of $3,590,168 (R. 24). The debtor also had received $200,677 from public investors for trailers which, as the result of the insolvency of an affiliated corporation, were never manufactured and, therefore, never delivered to the purchasers or introduced into the rental system (R. 2, 37, 76–77, 82).

In 1961, after the Commission had informed the debtor that the sales of the trailers under these arrangements constituted an investment contract and therefore a security required to be registered under the Securities Act of 1933, the debtor discontinued sales of the trailers. In March 1962, persons affiliated with the debtor organized Capitol Leasing Corporation ("Capitol") (R. 132–134, 231), which offered to exchange its stock for trailers or to sell the stock at $2.00 a share (R. 338). After Capitol had acquired 299 of the trailers in exchange for stock, the Commission temporarily suspended the exemption from registration upon which Capitol had relied in making this offer, on the ground that there was reasonable cause to believe that the material used in making the offer contained false and misleading statements (R. 335–337).[1]

[1] It had relied upon the conditional exemption from registration provided for small issues under Regulation A (17 C.F.R. 230.251 *et seq.*) adopted by the Commission under Section 3(a) of the Securities Act of 1933 (15 U.S.C. 77c(a)).

2. THE CHAPTER XI PROCEEDINGS

On December 20, 1962, the debtor filed in the United States District Court for the District of Colorado a petition for and a proposed plan of arrangement under Chapter XI of the Bankruptcy Act (R. 1–7). It stated that its total assets were $685,608, of which $500,000 represented the value of its trailer rental system, *i.e.*, its arrangements with the service station operator agents (R. 318). Its stated liabilities were $1,367,890, of which $710,597 was owed to trailer owners under their leasing agreements and $200,677 was owed to investors who had paid for but had not received trailers (R. 4). In addition, trade and general creditors had claims of $78,498, officers and directors had claims for loans to the corporation of $285,277, an accounting firm was owed $15,500, and there was an outstanding bank loan of $40,000 (R. 4).

Under the proposed arrangement, trailer owners are to sell their trailers to Capitol in exchange for Capitol's stock (R. 4–5). They are to receive one share for every $2.00 of "remaining capital investment in the trailers," which is to be determined by deducting from the original purchase price of the trailer the amount which the owners had received as rental payments (R. 3–4, 5). No additional compensation to the owners is provided for the $710,000 of unpaid rentals (R. 5, 6). Owners who elect not to exchange their trailers for Capitol's stock receive nothing under the plan (R. 4–5, 6). Investors who paid for but had not received trailers will receive one share of stock for each $2.00 of the purchase price (R. 6).

Trade and general creditors are to receive one share of stock for each $3.50 of their claims (R. 6).

The plan of arrangement provides that the debtor will transfer its system to Capitol in exchange for 107,000 shares, which the debtor will then distribute to its stockholders (R. 7). More than 60 percent of the debtor's stock is held by ten men; nine of them are officers and directors and the tenth is one of the original promoters of the venture (R. 32, 31). The plan further provides that officers and directors will receive one share of Capitol stock for each $5.50 of their claims for loans to the debtor, and that for five years such stock will have limited voting, dividend and liquidation rights (R. 540–542).[2]

3. THE MOTION TO TRANSFER THE PROCEEDINGS TO CHAPTER X

On February 20, 1963, the Securities and Exchange Commission filed a motion under Section 328 of the Bankruptcy Act to dismiss the Chapter XI proceed-

[2] The plan originally provided that officers and directors would receive one share for each $3.50 of their claims (R. 6). When the district judge denied the Commission's motion to dismiss the proceedings (see below), he further stated (App. B, *infra*, p. 16a) that "I do not think that the proposed plan gives the owners of the trailers a fair shake. In other words, unless this plan that is finally determined in this case under the Chapter 11 is such a plan that the investors themselves will have control of this corporation and not the management who got it in this shape, then I say it will be an improper plan." The debtor then modified the plan to reduce the participation of its officers and directors from one share for each $3.50 of their claims to one share for each $5.50, and also to change the method for discharge of the debtor's bank loan and its indebtedness for accounting services (R. 540–542).

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ings on the ground that the "proceedings should have been originally brought under Chapter X of the Bankruptcy Act because the Debtor's circumstances and capital structure are such that the relief afforded by Chapter XI is inadequate to satisfy the needs to be served" (R. 8). Any attempt to rehabilitate the debtor under Chapter XI, the Commission contended, would be inadequate and inconsistent with the policy of the Bankruptcy Act (R. 47–51). The Commission pointed out that whereas an arrangement under Chapter XI may affect only unsecured debts, the very plan proposed by the debtor demonstrated that more than such an arrangement was needed, since under the proposed arrangement stockholders of the debtor would participate in the successor enterprise while public investor creditors would be called upon to accept less than the full amount of their claims (R. 52). The Commission also urged that the circumstances required investigation of past management and an accounting, which could be provided only under Chapter X (R. 51).

The motion was referred to a referee in bankruptcy as special master for hearing and report (R. 55). After hearing, he recommended that the motion be denied, on the ground that the Commission had not demonstrated that adequate relief was unobtainable under Chapter XI (R. 238–40, 242), and that final "determination of the Section 328 motion ought to be postponed to the confirmation hearing [on the arrangement]" (R. 239). The district court confirmed and adopted the special master's findings, and denied the Commission's motion (R. 392–93). The

court stated that it was "not convinced that the needs to be served here can best be met by a Chapter X"; and that although "there may be in this situation need for new management, and there certainly is some question in my mind as to whether or not the management that is presently [operating] it * * * would continue to do so for the best interests of the investors * * * that has not been clearly established yet * * *" (App. B, *infra*, p. 15a).

The court of appeals affirmed. It stated (App. A, *infra*, p. 10a) that "since the granting of the motion rests in the discretion of the court, while we think this is a border-line case, it does not appear that the S.E.C. has shown that adequate relief is not obtainable in Chapter XI proceedings or that there has been an abuse of that discretion warranting reversal."[3]

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[3] The Commission had also filed a petition to intervene in the Chapter XI proceedings to show that, in violation of the antifraud provisions of the Securities Act of 1933, the information which the debtor used in procuring acceptances of the plan of arrangement was false and misleading (R. 323–352). As the court of appeals explained (App. A, *infra*, p. 11a), the Commission alleged, among other things, that "at the time debtor was sending letters to the trailer owners urging them to exchange their trailers for shares of Capitol Leasing stock, the president of Capitol and the officers and directors of the debtor were withdrawing their trailers from debtor and were leasing them to another concern engaged in a similar business, and were also urging their relatives to do the same. This was not disclosed to the trailer owners, nor were trailer owners furnished information of Capitol's financial condition or its management. Trailer owners were not told of pending proceedings involving other stock fraud charges against Capitol."

After hearing, a referee in bankruptcy denied the petition to intervene (R. 412–417), the district judge granted the peti-

REASONS FOR GRANTING THE WRIT

This case presents the important question whether widely scattered public investor-creditors of a financially distressed corporation can be deprived of the safeguards afforded by a thoroughgoing reorganization under Chapter X of the Bankruptcy Act—including an independent trustee, a full investigation and an impartially formulated plan of reorganization—through recourse to an arrangement under Chapter XI, where none of those protections are provided and where the rehabilitation is controlled by the management of the debtor.

We submit that Chapter XI is available only for adjustments involving trade or commercial creditors, and cannot be used to affect adversely the interests of public investor-creditors. This is so for two reasons: *First*, it would be inappropriate to adjust the rights of public creditors without giving them the benefit of the protective procedures which Congress provided in Chapter X for investors generally. *Second*, since

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tion to intervene but denied the relief sought (R. 596–597), and the court of appeals affirmed (App. A, *infra*, pp. 10a–13a). The Commission's appeal on the intervention issue was consolidated with the appeal from the denial of dismissal (*id.*, p. 1a). The court of appeals agreed that "if the stock involved here were not part of an arrangement, the disclosures made with regard to it would be clearly inadequate" and that there was no basis for holding that the creditor-investors here "are not entitled to as much information as are those persons acquiring stock under ordinary conditions" (App. A, *infra*, p. 12a). It concluded, however, that appropriate action could be taken by the district court. We are not seeking review of the court of appeals' ruling on this aspect of the case.

an arrangement under Chapter XI need not satisfy the "fair and equitable" standard which a plan of reorganization under Chapter X must meet, use of Chapter XI would permit a reduction in the rights of investor-creditors in order to give the junior security holders who control the management an interest in the reorganized company. In refusing to transfer this case, the courts below failed to follow these standards, reached a result which conflicts in principle with a leading decision of the Second Circuit (*Liberty Baking, infra,* pp. 16, 18), and departed from the teaching of *Securities and Exchange Commission* v. *United States Realty and Improvement Company,* 310 U.S. 434, and *General Stores Corp.* v. *Shlensky,* 350 U.S. 462. For in the latter cases this Court made it clear that "where c. X affords a more adequate remedy than c. XI" (*General Stores,* 350 U.S. at 467), "it was plainly the duty of the district court in the exercise of a sound discretion to have dismissed the [Chapter XI] petition, remitting respondent if it was so advised to the initiation of a proceeding under Chapter X, in which it may secure a reorganization which, after study and investigation appropriate to its corporate business structure and ownership, is found to be fair, equitable and feasible, and in the best interest of creditors" (*Realty,* 310 U.S. at 456–457).

1. (a) In the *Realty* case this Court discussed the evils which led Congress to adopt the reorganization provisions of the Bankruptcy Act, and described in detail the greater protections which Chapter X provides for investors. It pointed out (310 U.S. at 448) that among the conditions which were responsible for

the enactment of Section 77B of the Bankruptcy Act, the predecessor to Chapter X, were—

> * * * the inadequate protection of widely scattered security holders, the frequent adoption of plans which favored management at the expense of other interests, and which afforded the corporation only temporary respite from financial collapse * * *.

In order to protect public investors from overreaching by management in the formulation and implementation of reorganization plans, Congress provided in Chapter X a comprehensive system of safeguards to be administered under the supervision of the district court. Chapter X requires (except where liabilities are less than $250,000) the "appointment of a disinterested trustee" who is to conduct "a thorough examination and study * * * of the debtor's financial problems and management" and "to send the report to all security holders." It is the trustee, and not the management, who formulates a plan of reorganization. After the judge approves the plan, it is submitted with detailed information to creditors and stockholders for approval and, if they approve it, then is submitted to the district judge for confirmation. See 310 U.S. at 449–450.

"No comparable safeguards [to those provided in Chapter X] are found in Chapter XI" (*id.* at 450). It "provides a summary procedure by which a debtor may secure judicial confirmation of an 'arrangement' of his unsecured debts" (*id.* at 446). "Every phase of the procedure bearing on the administration of the estate and the development of the arrangement is

under the control of the debtor. The process of formulating an arrangement and the solicitation of consent of creditors, sacrifices to speed and economy every safeguard, in the interest of thoroughness and disinterestedness, provided in Chapter X. * * * The debtor proposes the arrangement * * * and the only opportunity afforded the creditors in respect to the proposed plan is to accept or reject it as submitted by the debtor. * * * There are no provisions for an independent study of the debtor's affairs by court or trustee, or for advice by them to creditors with respect to their rights or interests in advance of their consent to the arrangement. * * * The court in passing upon the arrangement, is * * * faced with the fact that a majority of the creditors have already accepted the plan." *Id.*, at 450–451. In short, any successful "arrangement" of the rights of creditors "if accomplished at all, must be without the aids to the protection of creditors and the public interest which are provided by Chapter X * * *" (*id.* at 453).

The Court concluded (p. 455) that "the adequacy of the relief under Chapter XI must be appraised in comparison with that to be had under Chapter X, and in the light of its effect on all the public and private interests concerned including those of the debtor."[4]

[4] The Court reaffirmed these principles in the *General Stores* case, where it held that the lower courts there had properly transferred a Chapter XI proceeding to Chapter X. It explained that in *Realty* it had "emphasized the need to determine on the facts of the case whether the formulation of a plan under the control of the debtor, as provided by c. XI, or the formulation of a plan under the auspices of disinterested trustees, as assured by c. X and the other protective provisions of

(b) In the present case adequate protection of the public investor-creditors plainly requires resort to Chapter X. The typical investor-creditor in American has (1) a trailer located at some gasoline service station which may be hundreds of miles from his residence, (2) the "right" to receive a fixed rental for the trailer, and (3) a substantial claim against the debtor for past rentals or, in the case of investors who had paid for but not received their trailers, for the purchase price. The proposed arrangement requires the owners to accept shares of stock in a corporation organized in 1962 by persons affiliated with the debtor, on the basis of one share of stock for every $2.00 of their "remaining capital investment." This is to be calculated, however, on the basis that all rentals which the owners had received were actually a return of capital rather than, as they had been told when they made their investment, income. They receive nothing for unpaid rentals, which total more than $700,000. While the investors are given the right to accept or reject the plan, realistically they are under tremendous pressure to accept, no matter how unfair it may seem. For if they reject, their entire claim against the debtor for back rentals is wiped out and they are left with only a trailer, probably far away, on which they are unlikely to realize more than a small fraction of their investment.

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that chapter, would better serve 'the public and private interests concerned including those of the debtor.' * * * [T]he controlling consideration in a choice between c. X and c. XI * * * is * * * the needs to be served" (350 U.S. at 465–466).

Although the investor-creditors are thus giving up under pressure a sizable portion of their claims against the debtor, members of the debtor's management, who are responsible for its present financial difficulties, will retain a significant interest in the successor company on the basis of their stock interest. Moreover, the old management is permitted to continue to operate the company, even though the district court recognized that "there may be in this situation need for new management" and stated that "there certainly is some question in my mind as to whether or not the management that is presently * * * operating it, would continue to do so for the best interests of the investors" (App. B, *infra*, p. 15a).

In short, this is a classic example of the kind of situation against which the safeguards of Chapter X were designed to protect public investors. There is no one to protect the interest of the investor-creditors, no one to develop and present to them the facts which they should have in order to exercise an informed judgment on whether to accept or reject the plan. The plan is proposed and acceptance thereof urged by a management (1) which is responsible for the company's present predicament, (2) whose interests appear to conflict with those of the investor-creditors, since the latter are being required to give up a substantial portion of their claims while the junior security holders continue to retain an interest in the business, and (3) which the Commission has accused of making false and misleading statements in soliciting acceptances of the plan (see note 3, *supra*, p. 9). There has been no investigation of the management to ascertain its capabilities and whether the

company has any claims against it; and no study of what type of reorganization of the company's businesses and finances is necessary for it to achieve economic health. These factors are among those which this Court referred to in the *General Stores* case as "typical instances where c. X affords a more adequate remedy than c. XI" (350 U.S. at 467). See, also, *Securities and Exchange Commission* v. *Liberty Baking Corp.*, 240 F. 2d 511 (C.A. 2), certiorari denied, 353 U.S. 930, where the court stressed a number of these factors in reversing a district court decision refusing to transfer a Chapter X proceeding.

2. The decision below also warrants review because it marks the first time that an appellate court has permitted Chapter XI to be utilized to deny public investor-creditors their right to absolute priority—a result which we believe is at variance with both *Realty* and *General Stores*. The importance of this issue is underlined by the fact that two other district courts recently have similarly approved the use of Chapter XI in situations where public investor-creditors would be denied absolute priority.[5]

A plan of reorganization under Chapter X may not be confirmed unless it is "fair and equitable" (11

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[5] *In re Crumpton Builders, Inc.* (M.D. Fla., No. 63–42–T), appeal from order denying motion to dismiss proceedings pending *sub nom. Securities and Exchange Commission* v. *Crumpton Builders, Inc.*, C.A. 5, No. 20712; *In re American Guaranty Corporation* (D. R.I., No. 63B17), appeal from order denying motion to dismiss proceedings pending *sub nom. Securities and Exchange Commission* v. *Burton*, C.A. 1, No. 6223. The appeal in the *Crumpton* case was argued on November 20, 1963, and the appeal in the *Burton* case on December 4, 1963.

U.S.C. 621(2)). These are "words of art" and require "that in any plan of corporate reorganization unsecured creditors are entitled to priority over stockholders to the full extent of their debts and that any scaling down of the claims of creditors without some fair compensating advantage to them which is prior to the rights of stockholders is inadmissible" (*Realty* case, *supra*, 310 U.S. at 452). This Court has consistently required, in whatever context publicly held corporations have been reorganized, that investor-creditors must be afforded full compensatory treatment before junior interests may participate.[8]

The present plan plainly does not satisfy the "fair and equitable" standard. For here the "scaling down of the claims of creditors" through elimination of the unpaid rentals and treatment of rentals already received as if they were a return of capital was made without any "compensating advantage to them which is prior to the rights of stockholders." On the contrary, the reduction of the investor-creditors' prior claims was obviously designed to enable the junior stock interests to participate in the reorganized corporation at the creditors' expense. If the fair and

[8] See, *e.g.*, *Northern Pacific Railway* v. *Boyd*, 228 U.S. 482, 502, 504 (equity receivership); *Case* v. *Los Angeles Lumber Co.*, 308 U.S. 106, 115–116 (reorganization under Section 77B of the Bankruptcy Act); *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, 527–529 (reorganization under Section 77B of the Bankruptcy Act); *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 484 (reorganization under Section 77 of the Bankruptcy Act); *Otis & Co.* v. *Securities and Exchange Commission*, 323 U.S. 624, 633–640 (reorganization under the Public Utility Holding Company Act of 1935).

equitable standard were applied in this case, it seems almost certain that only creditors would be entitled to any interest in the reorganized company.

Prior to 1952, Chapter XI had required that an arrangement, like a plan of reorganization under Chapter X, be "fair and equitable." That requirement was deleted from Chapter XI in that year, however (66 Stat. 433). The court of appeals was of the view that because of such deletion the fact that a plan of arrangement would not satisfy the "fair and equitable" standard is irrelevant in determining whether a Chapter XI proceeding should be transferred to Chapter X, where the standard still applies.

This conclusion is fully answered by *General Stores, supra.* That case was decided in 1956, four years after the amendment. The Court there listed, as one of three "typical instances where c. X affords a more adequate remedy than c. XI," a case where "[r]eadjustment of all or a part of the debts of an insolvent company without sacrifice by the stockholders may violate the fundamental principle of a fair and equitable plan * * * as the *United States Realty Co.* case emphasizes" (350 U.S. at 467, 466). In other words, the fact that a plan of arrangement under Chapter XI need no longer satisfy the "fair and equitable" standard may be the very reason why Chapter XI does not provide adequate relief where the interests of public creditors are being adversely affected for the benefit of junior security holders. Thus, in *Securities and Exchange Commission* v. *Liberty Baking Corporation*, 240 F. 2d 511, 515 (C.A.

2), certiorari denied, 353 U.S. 930, the court stated that because there was "a grave question whether the plan would deprive creditors of their 'absolute priority' rights as against stockholders * * * the need for resort to Chapter X is much greater than was the need in General Stores."

The legislative history of the deletion of the "fair and equitable" standard from Chapter XI shows that this change was a mere "clarifying" and "uncontroversial" amendment.[7] Its intent, we believe, was to make it clear that under Chapter XI trade creditors could have their claims reduced without any change in the interests of junior security holders. Cf. *Securities and Exchange Commission* v. *Wilcox-Gay Corp.*, 231 F. 2d 859 (C.A. 6). It is one thing if informed businessmen, in order to retain a customer who is seeking to extricate itself from financial difficulties, are willing to accept a reduction of their claims without any change in the junior security interests. It is quite another, however, if uninformed public investor-creditors are required to accept less than their claims in a reorganization in which the junior interests who propose the plan themselves participate.

Whatever discretion a district court may have in other situations in deciding whether a Chapter XI

[7] H. Rep. No. 2320, 82d Cong., 2d Sess. (1952), pp. 2–3. See also S. Rep. No. 1395, 82d Cong., 2d Sess. (1952), p. 23, containing a chart prepared by the National Bankruptcy Conference, which initiated these amendments, classifying the deletion of "fair and equitable" from Section 366 as a "perfecting or clarifying" amendment, as distinguished from a "substantive" or a "corrective" one.

proceeding belongs in Chapter X, here transfer to Chapter X was required as a matter of law. For, as we have shown, Chapter XI is not available for dealing with the interests of investor-creditors; such interests may be affected only under the "fair and equitable" standard which Chapter X alone requires.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1964.

APPENDIX A

United States Court of Appeals
Tenth Circuit

Nos. 7392-7474—November Term, 1963

In the Matter of

AMERICAN TRAILER RENTALS COMPANY

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

vs.

AMERICAN TRAILER RENTALS COMPANY, DEBTOR—APPELLEE

Appeal From The United States District Court For The District of Colorado

Before MURRAH, Chief Judge, and PHILLIPS and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

This is a consolidated appeal from two orders of the United States District Court for the District of Colorado, growing out of an arrangement proceeding under Chapter XI of the Bankruptcy Act (11 U.S.C. § 701, et seq.), in which American Trailer Rentals Company is the debtor.[1] Securities and Exchange

[1] No. 7392 is an appeal from a denial of the Commission's application under Section 328 of the Bankruptcy Act (11 U.S.C. § 728), to dismiss the debtor's petition under Chapter XI, on the ground that it should properly be a Chapter X proceeding.

No. 7474 is an appeal from an order denying the Commis-

Commission is the appellant in both instances. The S.E.C. contends that the District Court erred in denying its motion to intervene and to dismiss the Chapter XI petition unless the proceedings were continued under Chapter X of the Bankruptcy Act. (11 U.S.C. § 501, et seq.) It is urged that the relief afforded by Chapter XI is inadequate because the circumstances disclosed by the record indicate the necessity of an independent investigation of the proposed new management and the methods used in soliciting approval of the plan, which can be accomplished only in a Chapter X proceeding.

The debtor is a Colorado corporation organized in 1958 to engage in the business of renting automobile trailers to the general public for local and cross-country trips. Originally, the trailer rental system had been operated by a complex of inter-related corporations, of which the debtor was one. In 1961, the remaining corporations of the complex were merged into the debtor. Under the rental system as operated by debtor, trailers were sold to individuals and leased back to the debtor. These trailers are the ordinary, utility type, which may be attached to the rear of an automobile by means of a detachable bumper hitch furnished as part of the trailer equipment. The trailers were placed at gasoline service stations in several states, with individual station operators acting as rental agents for the debtor.[2]

Under the sale-and-lease-back contracts with the individual trailer owners, the debtor had agreed to a

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sion's motion to intervene in the Chapter XI proceedings to show a violation of Section 17 (fraud provisions) of the Securities Act of 1933, and confirming the arrangement as modified.

[2] When the petition herein was filed, these agents, scattered throughout the country, numbered about 500.

fixed return per year, based on the cost of the trailer. Three payment plans were used, (1) a guaranteed payment of 2% per month for 10 years, (2) a guaranteed payment of 3% per month for 5 years, and (3) a payment of 35% of the rental income less repairs. A majority of the agreements were for 2% per month for 10 years. The debtor, in its proposed arrangement, stated that these fixed payments, since unrelated to the actual earnings of the trailers, were the major cause of its financial difficulties.

When the petition was filed on December 20, 1962, the debtor stated its assets to be $685,608.82, and its liabilities $1,367,890.66.[3] Its trailer network consisted of approximately 3,000 trailers, owned by about 1,200 individuals, and located throughout the country at the rental stations. Debtor's peak earnings had been $60,000 per month, but diminished to about $14,000 per month when this proceeding was instituted, and was down to $4,000 per month when the Commission's petition was filed. Considering the payments made

[3] Assets:

$500,000.00	rental network (intangible asset)
173,196.07	accounts receivable
10,712.75	furniture and equipment
1,700.00	vehicles and service equipment.
$685,608.82	

Liabilities:

$5,611.58	secured debt (chattel mtgs. on furniture, vehicles and service equipment)
727,585.97	executory contracts
230,783.29	accounts payable
392,533.15	notes payable
6,691.97	wages and commissions
4,684.70	taxes
$1,367,890.66	

(From Referee's Statement)

under the leasing agreements as a return of capital, the trailer owners' remaining investment in the 3,000 trailers totaled $1,532,902.43.

The arrangement proposed, as modified, provides that the trailer owners would transfer title to their trailers in exchange for one share of stock in the newly created Capitol Leasing Corporation,[4] for each two dollars of their remaining investment in exchange for the title to the trailers, and forego their claims for past and future payments growing out of their leasing agreements. Persons who had paid in $200,677 for trailers which were never manufactured are to receive one share for each $2.00 paid.[5] The trailer rental system is to be assigned to Capitol Leasing in exchange for 107,100 shares. Unsecured creditors are to receive one share for each $3.50 of debt, except those unsecured creditors who are also officers and directors of the debtor, who are to be given one share for each $5.50 of debt. A $40,000 bank debt is to be assumed by the president of the debtor and he will receive one share for each $5.50 of the assumed obli-

[4] Capitol Leasing Corporation was formed on March 27, 1962, for the purpose of salvaging debtor's business. In May of that year, it commenced the public offering of its shares under the Regulation "A" Exemption, Securities Act of 1933, in exchange for cash or trailers. Only trailers were exchanged. On October 9, 1962, the S.E.C. stop-ordered the Regulation "A" offering on the grounds that the notification and offering circular were false and misleading. By that time, Capitol Leasing had acquired 299 trailers in exchange for 88,332 shares of its no-par stock, on the basis of one share for each $2.00 of investment. The only outstanding shares of Capifol's authorized 3,200,000 shares are those issued in exchange for the trailers prior to the stop-order.

[5] This amount was paid to DeMar, Inc., a Nebraska corporation, which in 1960 was granted the exclusive right to manufacture trailers for the system, but has since been adjudicated a bankrupt.

gation. The amount due the accountants is to be paid by individual officers and directors of the debtor as guarantors of debtor's note. The court expressed some objection to the initial arrangement, indicating that it did not appear to give the trailer owners a "fair shake." It was indicated that an acceptable plan should be one which resulted in the investors' control of the corporation, and noted that investors should perhaps get more than one share for each $2.00 of investment, while management should get less than one share for each $3.50 as was originally proposed. Following those comments, debtor submitted the amendments to the arrangement.

The Commission, in its motion under Section 328 of the Bankruptcy Act, 11 U.S.C. § 728, to dismiss the Chapter XI proceedings, alleges that this is properly a Chapter X proceeding for three reasons;[6] first, that the debtor needs more than just an arrangement with its unsecured creditors; second, that the public investors need a disinterested trustee to protect

[6] Title 11, U.S.C. § 728, provides:

"The judge may, upon application of the Securities and Exchange Commission or any party in interest, and upon such notice to the debtor, to the Securities and Exchange Commission, and to such other persons as the judge may direct, if he finds that the proceedings should have been brought under Chapter 10 of this title, enter an order dismissing the proceedings under this chapter, unless, within such time as the judge shall fix, the petition be amended to comply with the requirement of chapter 10 of this title for the filing of a debtor's petition or a creditors' petition under such chapter, be filed. Upon the filing of such amended petition, or if such creditors' petition, and the payment of such additional fees as may be required to comply with section 532 of this title, such amended petition or creditors' petition shall thereafter, for all purposes of chapter 10 of this title, be deemed to have been originally filed under such chapter."

and enforce their rights; and third, that Chapter X is required so that public investors will receive fair and equitable treatment. Since a petition for reorganization under Chapter X cannot be filed if "adequate relief would be obtainable by a debtor's petition under * * * Chapter XI * * * ." (§ 146(2), Bankruptcy Act; 11 U.S.C. § 546(2)), the ultimate question is whether "adequate relief" is obtainable under the debtor's proposed arrangement.[7] Chapter XI does not require that the arrangement be "fair and equitable" as does Chapter X, (§ 221(2), Bankruptcy Act, 11 U.S.C. § 621(2); but only that it be feasible and in the best interest of the creditors. (§ 366(2), Bankruptcy Act, 11 U.S.C. § 766(2)). The essential consideration in the choice between Chapter X and XI is "the needs to be served." General Stores Corp. v. Shlensky, 350 U.S. 462, 466. Although Chapter XI is limited to arrangements dealing with unsecured debts, (§ 306(1) Bankruptcy Act, 11 U.S.C. § 706(1), the mere existence of public investors does not preclude the use of Chapter XI. General Stores Corp. v. Shlensky, supra; Grayson-Robinson Stores, Inc. v. S.E.C., 2 Cir., 320 F. 2d 940. However, the more complex the debt structure and stock distribution, the greater the likelihood that the more complex procedures and safeguards of Chapter X are required. In re Transvision, 2 Cir., 217 F. 2d 243, cert. denied

[7] The judge may, upon application and notice, dismiss a Chapter XI petition if he finds that the proceedings should have been brought under Chapter X. (§ 328, Bankruptcy Act, 11 U.S.C. § 728). This determination rests in his sound judicial discretion. General Stores Corp. v. Shlensky, 350 U.S. 462; S.E.C. v. Wilcox-Gay Corp., 6 Cir., 231 F. 2d 859; In re Transvision, Inc., 2 Cir., 217 F. 2d 243, cert. denied 348 U.S. 952.

348 U.S. 952; Grayson-Robinson Stores, Inc. v. S.E.C., supra.[4]

The Securities Exchange Commission argues that the arrangement as proposed by debtor is not really an arrangement at all, because if the plan is effected, the creditors of the debtor will be transformed into shareholders of the new corporation. The arrangement indicates that there is an aggregate remaining capital investment in the trailers of $1,532,902.43, which includes unpaid leasing fees in the amount of $710,597.53. Therefore, debtor states that trailer

[4] Chapter X involves more complex procedures and safeguards than does Chapter XI. Chapter X requires the appointment of an independent trustee, the investigation of the activities and affairs of the debtor, the plan or reorganization as formulated by the trustee, the S.E.C. participating in an advisory capacity, and the creditors' committees subject to judicial control and scrutiny. See, generally, Collier on Bankruptcy, 14th Ed. Vol. 6, §§ 0.08[3], 0.09.

Although not expressly limited to the use of large corporations, Chapter X was, in effect, designed for the larger corporation which shares widely held by the public and with complicated debt structures. S.E.C. v. U.S. Realty Co., 310 U.S. 434. However, the choice between Chapter X and Chapter XI "is not determined solely by the size and capital structure of the company but, rather, by the nature of the interested parties, the necessity for independent investigation and control, the degree to which the debtor's activities must be readjusted." Collier on Bankruptcy, 14th Ed. Vol. 6, 1962 Supp. p. 7.

Factors appropriate to a Chapter XI arrangement include (1) simple corporate structure, (2) more than half the common stock held by management, (3) no interference with shareholder's rights, (4) acceptance of plan by unsecured creditors, (5) provision for priority creditors, (6) inability of corporation to bear expense of Chapter X proceeding. In re Lea Fabrics, 3 Cir., 272 F. 2d 769; vacated as moot sub. nom. S.E.C. v. Lea Fabrics, Inc., 363 U.S. 417. Collier on Bankruptcy, 14th Ed. Vol. 6, 1962 Supp. p. 7.

owners are to be compensated for their claims at the rate of one share for each $2.00 since the plan states that 766,451 shares of Capital Leasing will be required to acquire title to all the trailers.[9] As the S.E.C. points out, there is no provision in the arrangement for trailer owners who do not choose to exchange their trailers for stock. In such cases the owners would retain title and the right of possession to their trailers.

The Commission also infers that debtor's remarks concerning a need for additional financing in order to salvage the business, and the implication that debtor's management may have engaged in some mishandling of corporate funds, supports the position that an independent trustee such as Chapter X provides, is necessary to assure fair and equitable treatment of public investors. The S.E.C. states that the most serious aspect of unfairness relates to the compensation of debtor's shareholders, as compared to the trailer owners. The S.E.C. argues that in the absence of a fresh contribution of capital, the stock-holders are entitled to receive nothing until the creditors (the trailer owners) are compensated in full, and that to do otherwise, as the plan contemplates, would be a violation of the absolute priority rule as laid down in Case v. Los Angeles Lumber Products Co., 308 U.S. 106,[10] reh. denied 308 U. S. 637. But Section 366 states in part, that "Confirmation of an arrangement shall not be refused solely because the interest

[9] Debtor assumes that the leasing fees previously paid trailer owners constituted a return of capital, if so, trailer owners would appear to receive compensation for their claims.

[10] The 1952 Amendment of § 366(2), Bankruptcy Act, 11 U.S.C. § 766(2), (66 Stat. 433, P.L. 456, 82d Cong., 2d Sess. § 35) eliminated from Chapter XI proceedings the "fair and equitable" provision, since in S.E.C. v. U.S. Realty Co., 310 U.S. 434, it was held that they were "words of art" having a

of a debtor, or if the debtor is a corporation, the interests of its stockholders or members will be preserved under the arrangement." In the legislative

well-understood meaning requiring an application of the principles of priority. The Court stated (310 U.S. 434, 452) that: "The phrase signifies that the plan or arrangement must conform to the rule of *Northern Pacific Ry. Co. v. Boyd*, 228 U.S. 482, which established the principle which we recently applied in the *Los Angeles case*, [Case v. Los Angeles Lumber Products Co., 308 U.S. 106, reh. denied 308 U.S. 637] that in any plan of corporate reorganization unsecured creditors are entitled to priority over stockholders to the full extent of their debts and that any scaling down of the claims of creditors without some fair compensating advantage to them which is prior to the rights of stockholders is inadmissible."

However, Chapter XI is derived from the composition procedure of the former § 12 of the Bankruptcy Act, in which the fair and equitable rule did not apply. The essence of Chapter XI is to permit the scaling down of debts, while allowing the debtor to keep his business and property. While this may be in the best interests of the creditors, it is contrary to the principles of priority expressed in the Boyd and Los Angeles Lumber cases. But the rule of those cases "cannot realistically be applied in a Chapter XI * * * proceeding. Were it so applied, no individual debtor and, under Chapter XI, no corporate debtor where the stock ownership is substantially identical with management could effectuate an arrangement except by payment of the claims of all creditors in full." U.S. Code Cong. & Adm. News, 82d Cong. 2d Sess. Vol. 2, 1952, pp. 1981-2; Hanna & MacLachlan, The Bankruptcy Act Annotated Foundation Press, 1957, pp. 246-7.

But see, S.E.C. v. Liberty Baking Corp., 2 Cir., 240 F. 2d 511, cert. denied 353 U.S. 930, which indicates that the "fair and equitable" rule may be applied in determining whether Chapter X or Chapter XI should be used. If the arrangement proposed to be accomplished under Chapter XI contains features which bring it within Chapter X, then an application of the "fair and equitable" rule is relevant. However, if the plan is properly within Chapter XI, it does not have to measure up to that standard. Collier on Bankruptcy, 14 Ed. Vol. 9, § 9.18 [2.1]. Collier states that "Since the legislative elimi-

history of the 1952 amendments relating to Section 366, it is stated:

> "The proposed amendment is designed to remove the fair and equitable provision, and by the paragraph added to each of the amended sections it is made clear that the rule of the Boyd and Los Angeles cases shall not be operative under those three chapters. [Chapters XI, XII, XIII]." U.S. Code, Cong. and Adm. News, 82d Cong. 2d Sess. 1952, p. 1982.

S.E.C.'s position begs the question since it assumes that the arrangement has features which require the procedures of Chapter X. See S.E.C. v. Liberty Baking Corp., 2 Cir., 240 F. 2d 511, cert. denied 353 U.S. 930. However, since the granting of the motion rests in the discretion of the court, while we think this is a border-line case, it does not appear that the S.E.C. has shown that adequate relief is not obtainable in Chapter XI proceedings or that there has been an abuse of that discretion warranting reversal.

The second order appealed from relates to the confirmation of the arrangement as modified, and the denial of S.E.C.'s request to intervene to show violations of Section 17 (fraud provisions) of the Securities Act of 1933, (15 U.S.C. § 77q). While Securities issued under Chapter XI proceedings are exempt from Section 5 (registration) under the Securities Act of 1933, (15 U.S.C. § 77e), they are not exempt from Section 17.[11]

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nation of the 'fair and equitable' test, use and reliance on these words, in view of their past interpretation, should not be continued. While several decisions have continued to refer to the 'fair and equitable' test, other and sound reasons for favoring Chapter X over Chapter XI were present in those cases." Id. at p. 306.

[11] Section 3(a)(10), Securities Act of 1933, 15 U.S.C. § 77c (a)(10); Section 17(c), Securities Act of 1933, 15 U.S.C. § 77q(c); Section 393, Bankruptcy Act, 11 U.S.C. 793.

The S.E.C. alleges that at the time debtor was sending letters to the trailer owners urging them to exchange their trailers for shares of Capitol Leasing stock, the president of Capitol and the officers and directors of the debtor were withdrawing their trailers from debtor and were leasing them to another concern engaged in a similar business, and were also urging their relatives to do the same. This was not disclosed to the trailer owners, nor were trailer owners furnished information of Capitol's financial condition or its management. Trailer owners were not told of pending proceedings involving other stock fraud charges against Capitol.

The S.E.C. has on two prior occasions stopped the sale of securities by debtor and Capitol. The first was with regard to debtor in 1961 when the S.E.C. informed debtor that its trailer rental plans were investment contracts and, therefore, securities requiring registration. A registration statement was filed, but never became effective, and the issue was stop-ordered on the ground that the statement contained false and misleading statements and omitted certain material facts. The second involved the shares issued under the Regulation "A" exemption by Capitol Leasing Company in exchange for trailers. (See, footnote 4, supra.)

The S.E.C. also notes a number of other omissions of facts which it considers material if the investors are to be able to make an informed judgment on the arrangement. S.E.C. contends that the circumstances surrounding the offering of Capitol Leasing stock under the arrangement is even more unfavorable and with less disclosure than the offering of Capitol under the Regulation "A" exemption which was stop-ordered.

Under Section 17(a), Securities Act of 1933, 15 U.S.C. § 77q(a), the failure to state the whole truth with regard to a security is equally as unlawful as statements of halftruths or deliberate falsehoods. Hughes v. S.E.C., C.A.D.C., 174 F. 2d 969. It is the impression created by the statements which determines whether they are misleading. Kalwajtys v. F.T.C., 7 Cir., 237 F. 2d 654, cert. denied 352 U.S. 1025; S.E.C. v. Macon, D.C. Colo., 28 F. Supp. 127. Cf. Birko v. S.E.C., 2 Cir., 316 F. 2d 137. Section 17(a) is not limited to the common-law definition of fraud. Hughes v. S.E.C., supra; Norris & Hirshberg v. S.E.C., C.A.D.C., 177 F. 2d 228, cert. denied 333 U.S. 867; Loss, Securities Regulation, 1 Vol. Ed. p. 1435. From the authorities, it appears that if the stock involved here were not part of an arrangement, the disclosures made with regard to it would be clearly inadequate. No authority has been found which would indicate that recipients of stock issued in connection with an arrangement are not entitled to as much information as are those persons acquiring stock under ordinary conditions.

The S.E.C. points out in its brief that the simplest procedure would be for debtor to voluntarily provide the needed information,[12] and, failing in that, the referee should have ordered that disclosure be made. We think this is a matter which the District Court

[12] In its brief, the S.E.C. states:

"It has been the Commission's position throughout that the simplest and most efficient resolution of the issue it has raised would be for the debtor and Capitol to send to trailer owners a statement or letter containing the material facts to which they are entitled. Had this been done, there would have been no need for this appeal or the expensive and time-consuming antecedent proceedings. Trailer owners could have been resolicited to accept the arrangement on the basis of adequate and accurate information."

can now handle. If it appears that, for the protection of those being solicited to accept the plan, additional information is necessary, the Court should so order. The Court has directed that the stock ratio for Capitol Leasing be such that the creditors will have control of the new corporation. In proceedings such as this, the District Court retains jurisdiction until the plan is carried out. §§ 368, 369, Bankruptcy Act, 11 U.S.C. §§ 768, 769. It may be that even without the additional information, the arrangement would still be in the "best interests of the creditors." (§ 366, 11 U.S.C. § 766), since that involves a comparison between what they will receive under the arrangement and what they would receive on liquidation. In re Village Men's Shops, Inc., D.C. Ind., 186 F. Supp. 125. The debtor has little or no tangible assets, and if it were liquidated it is not unlikely that the trailer owners, or at least many of them, would have difficulty realizing anything for their trailers.[13]

For an arrangement to be "feasible," the creditors must be assured of receiving what is promised them under the arrangement, but it does not require an assurance of future business success. In re Slumberland Bedding Co., D.C. Md., 115 F. Supp. 39.

Affirmed.

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[13] In the debtor's proposed arrangement it was stated: "Unless the plan is adopted, proponents suggest that creditors will receive little, if anything, in settlement of debtor's obligation to them, and that trailer owners may find themselves unable to realize any value for their trailers or any income from their operation."

APPENDIX B

In the United States District Court for the District of Colorado

Br. 33276

In the Matter of

AMERICAN TRAILER RENTALS COMPANY, DEBTOR.

OFFICIAL TRANSCRIPT

Ruling of the Court

Proceedings had before the Honorable Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado, beginning at 9:00 a.m., on the 3d day of May, 1963, in Court Room A, Main Post Office Building, Denver, Colorado.

Ruling of the Court

THE COURT: The Court is of the opinion that the Securities and Exchange Commission has failed to establish that the findings of fact and conclusions of law of the Special Master with the exception of those findings related to the cost are clearly erroneous.

Therefore, the Court will confirm and adopt the findings insofar as they pertain to the denial of the 328 motion.

As I stated at the outset of this hearing, I have studied the file in this case prior to the hearing. I listened to the arguments of counsel, and I am not convinced that the needs to be served here can best be met by a Chapter 10.

The cases that were cited and which I looked at, none of them involved a company who operated a business such as the one that we have here. It seems to me that actually there are no assets whatsoever in this corporation, except maybe some desks, some furniture, except its net worth, if we may use that term, or—I think that's satisfactory—its net worth of filling-station operators who serve as agents to rent these trailers out to prospective users.

Now, there may be in this situation need for new management, and there certainly is some question in my mind as to whether or not the management that is presently representing it would—I mean, operating it, would continue to do so for the best interests of the investors. However, that has not been clearly established yet and if there is any indication of any criminal activity on the part of the people who are running the company, this should by the SEC be investigated and if found that there is any or has been any criminal activity should be reported to the proper authorities in the Justice Department.

I don't think it is the function of this Court under a Chapter 10 proceedings to—that is, the primary function—to investigate a claim of poor business management or improper business management, or maybe even criminal action on the part of management or some officers or directors of the company. This would be—this investigation would be incidental.

I do not think the investigation can be best made by a trustee, because there are no funds with which to do this. Now, there are some funds coming in, but these funds better be used to pay the debts of the corporation, and to pay off the investors if there is sufficient funds.

It has been our experience—shall I say, my experience, in this Court, with the exception of one case

under Chapter 10 that I have had, none of them work out. We spend a good bit of the money that is available on trustees and attorneys fees and we end up in worse shape than we did before.

Most of these businesses that reach this point probably would be better off to be in bankruptcy as far as the creditors are concerned. In other words, they are ill. The illness is terminal and it is just a question of whether or not the life should be prolonged, I think aptly describes the situation that we find in many of these cases.

Now, I have, or, I want to express for the record some objection to the proposed plan. I do not think that the proposed plan gives the owners of the trailers a fair shake.

In other words, unless this plan that is finally determined in this case under the Chapter 11 is such a plan that the investors themselves will have control of this corporation and not the management who get it in this shape, then I say it will be an improper plan. Therefore, that would suggest that the investors should have more than one share of stock for each two dollars and management less than one share for each three dollars and a half, but at any rate, the proportion of the ratio should be such as the investors will have control of the corporation. This is the only way, in my opinion, that it can properly operate.

Now, also in connection with the plan, consideration should be given to treating all creditors alike. One creditor should not be paid just because the officers guaranteed that payment and another creditor not paid in cash. The bank, for example. These people are knowledgeable in this business. They are sophisticated lenders, and to treat them with some special treatment as against an individual who is a creditor is not, in my opinion, equity or justice.

Now, there is still pending, as I understand it, the motion of the SEC to intervene. This is a matter to be determined by the referee, but it seems to me the SEC could very well serve a useful purpose in a Chapter 11 proceedings. They have certain expertise in the field of securities. They have certain knowledge that would be helpful. They can advise and they can also serve somewhat in a similar capacity as they do under Chapter 10. I merely pass that on for what it may be worth.

I think under the circumstances here that Chapter 11 having been first filed and the rules as I understand it that Chapter 10 should be used only if 11 is not available, which gives further weight to the conclusion that the findings of the referee are not clearly erroneous, because I think Chapter 11 is available in the state of the matter as it is presented to the Court at this time.

* * * * *

Either counsel have anything further at this time?

Mr. MAXWELL: [counsel for the debtor] May I make one comment?

The COURT: Yes.

Mr. MAXWELL: I agree with some of the comments you made on the alterations on the plan and such will be presented along the line that you have suggested.

The COURT: Thank you, Mr. Maxwell. You may announce recess.

APPENDIX C

In the United States Court of Appeals for the Tenth Judicial Circuit Sitting at Denver, Colorado

TWENTY-FIRST DAY, NOVEMBER TERM, MONDAY, DECEMBER 9TH, 1963

Present: Honorable JEAN S. BREITENSTEIN, Circuit Judge, and other officers as noted on the 12th day of November, 1963.

Before Honorable ALFRED P. MURRAH, Chief Judge, and Honorable ORIE L. PHILLIPS and Honorable JOHN C. PICKETT, Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION, APPELLANT,

7392–7474

vs.

AMERICAN TRAILER RENTALS COMPANY, APPELLEE.

In the Matter of

AMERICAN TRAILER RENTALS COMPANY, DEBTOR

Appeals from the United States District Court for the District of Colorado.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby affirmed.

A true copy as of record,
Teste:

ROBERT B. CARTWRIGHT,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1966